STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
STANLEY H. HOOD,	)	
	)	Charge No.: 2004CA3552
Complainant,	)	EEOC No.: 21BA42226
	)	ALS No.: 05-414
and	)	
	)	
PROVIDENT HOSPITAL OF COOK COUNTY,	)	
	)	
	)	
Respondent.	)	

ORDER

This matter coming before the Commission pursuant to a Recommended Order and Decision, the Respondent's Exceptions filed thereto.

The Illinois Department of Human Rights is an additional statutory party that has conducted state action in this matter. They are named herein as an additional party of record. The Illinois Department of Human Rights did not participate in the Commission's consideration of this matter.

IT IS HEREBY ORDERED:

1. Pursuant to 775 ILCS 5/8A-103(E)(1) & (3), the Commission has **DECLINED** further review in the above-captioned matter. The parties are hereby notified that the Administrative Law Judge's Recommended Order and Decision, entered on **August 25, 2010** has become the Order of the Commission.

STATE OF ILLINOIS	)	
	)	**Entered this 28th day of October 2011**
HUMAN RIGHTS COMMISSION	)	

Commissioner Marti Baricevic

Commissioner Terry Cosgrove

Commissioner Patricia Bakalis-Yadgir

STATE OF ILLINOIS
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	)	
Respondent.	)	

RECOMMENDED LIABILITY DETERMINATION

On September 15, 2005, the Illinois Department of Human Rights (Department) filed a two count complaint against Respondent alleging discrimination based on physical handicap.

A public hearing was held on August 1-3, 2007 on the allegations of the complaint. Both parties were represented by counsel and both parties have filed post-hearing briefs. This matter is ripe for a decision.

The Department is an additional statutory agency that has issued state actions in this matter. Therefore, the Department is an additional party of record.

Findings of Fact

Based upon the record in this matter, I make the following findings of fact:

1. Complainant received certification as a building engineer from the City of Chicago around 1986.

2. Complainant was hired by Respondent on October 13, 1993 as an Operating Engineer.

3. Operating Engineers work three shifts: from 11:00 p.m. to 7:00 a.m.; 7:00 a.m. to 3:00 p.m. and 3:00 p.m. to 11:00 p.m.

4. Complainant worked a split shift, two days 3:00 p.m. to 11:00 p.m., two

days 11:00 p.m. to 7:00 a.m., and one day from 7:00 a.m. to 3:00 p.m.

5. There are two operating engineers on the day shift and one operating engineer on the other shifts.

6. Respondent has two buildings which the operating engineers are responsible for maintaining as set forth in Respondent's position accountabilities.

7. Respondent's Position Summary for Operating Engineer 1 states that the Operating engineers are to "Assist with monitoring boiler plant insuring adequate supply of steam for heat, sterilization, and other requirements of the hospital."

8. An Operating Engineer must be able to distinguish between various sounds in order to properly respond to alarms and hospital codes.

9. Respondent has three high-pressure boilers, two 5,000 ton chillers and ten heating, ventilation and air conditioning (HVAC) units.

10. The engineer's office is in the basement of Respondent hospital adjacent to the boiler room.

11. A computer provides readouts from the various operations of the HVAC Units. On the right wall of the office is a Kaltron unit which registers if there is a fire and a system with a central alarm system.

12. When they are functioning properly, a green light is always on. A red light comes on and a Klaxon horn goes off which has a very loud, piercing sound in the event of a problem.

13. A central alarm system, near the Kaltron unit, also uses a series of lights to notify the engineer of any fan, boiler or pump failure.

14. The alarm panel has a white button at the bottom which flashes when the Klaxon horn sounds.

15. During Complainant's tenure with Respondent, the system functioned erratically.

16. In January 2004, Respondent hospital had an annunciator panel which had been installed in 1978; it was often disconnected.

17. The hospital annunciator panel did not have a Klaxon horn in January, 2004.

18. A supplemental system, installed shortly after January 15, 2004, beeps to alert the engineer of a problem; the engineer then checks the computer screen for the location of the problem.

19. Engineers would sometimes disconnect the system as the alarm would go off at times when there was no problem.

20. When the HVAC unit shuts down, that information is generally stored in the computer.

21. When the fan shuts off, the humidifier works overtime causing condensation. It would take about 12 hours for the amount of condensation to build up that was in the surgical suite on January 14, 2004.

22. Prior to February, 2004, Complainant had never had a problem hearing any of the alarms at his post.

23. Prior to February, 2004, during a malfunction when the Klaxon horn was unplugged to diagnose an engineering problem, the engineers would rely on their familiarity with the equipment or notification from Respondent's staff.

24. The engineers keep an "Engineer's Log" to note boiler pressure and any incidents.

25. Although engineers are to receive annual evaluations, Complainant's last evaluation was in 2002.

26. The plant operations director and the chief engineer are responsible for the evaluations in which engineers are rated on their job performance.

27. In January, 2004, Jerry Woodard (Woodard) was plant operations director and Phil McDade (McDade) was acting interim chief engineer.

28. Complainant's Monthly Performance Report for October, 2002 shows an overall rating of 82 which translates to a good performance.

29. Complainant's Criteria for Employee Performance Report dated October 16, 2001 shows an overall rating of 82.

30. Complainant's Employee Performance Report for the period of October 16, 1999 to October 16, 2000 shows an overall rating of 82.

31. During Complainant's employment with Respondent, he never received an overall rating below 82.

32. According to the engineer's log, on January 14, 2004, at about 10:30 a.m. a malfunction (the incident) occurred in a hospital suite which became flooded with condensation, possibly due to the failure of the HVAC unit.

33. At the time of the incident, Complainant wore a hearing aid in his left ear only.

34. Complainant was not on duty at the time of the incident.

35. On January 14, 2004, Complainant worked alone on the 3:00 p.m. to 11:00 p.m. shift and spoke to Steve Henry (Henry) about the January 14, 2004 incident.

36. After the incident, Complainant saw Dr. Mughal, Respondent's Director of the Department of Employee Health Services.

37. Dr, Mughal directed Complainant to have his hearing evaluated due to Mughal's concern about hospital safety. The incident was never mentioned during that conversation.

38. Complainant was never reprimanded, written up or interviewed regarding the incident.

39. Complainant had previously been diagnosed with bilateral hearing loss.

40. Dr. Mughal directed Dr. McDermott, Complainant's primary physician, to

determine the severity of Complainant's bilateral hearing loss and what, if any, accommodations he might need to perform his job safely.

41. Dr. McDermott referred Complainant to Dr. Micco, an otolaryngologist, who he had been seeing for about six years prior to the January, 2004 incident. An otolaryngologist specializes in the ear, nose and throat.

42. Dr. Micco examined Complaint and referred him to an audiologist for an audiology exam (hearing test).

43. Dr. Micco advised Complainant that, after fluid was drained from his right ear, he could return to work.

44. Dr. Micco's Chart Note of February 2, 2004, addressed to Dr. Mughal, indicates that, although Complainant had severe bilateral hearing loss, he should be able to hear alarms and hospital codes over the intercom. With hearing aids in both ears Complainant should be able to return to work.

45. When Dr. Micco saw Complainant in February, 2004, he found a small amount of fluid in Complainant's right ear. No treatment was suggested, as fluid often clears itself without treatment.

46. Complainant met with Dr. Mughal on February 25, 2004. Dr. Mughal indicated that Dr. Micco's report was not satisfactory as Dr. Micco did not have a copy of Complainant's job description. Dr. Mughal recommended the Complainant take a medical leave of absence and apply for disability. There was no understanding as to when Complainant could return to work.

47. Complainant was placed on involuntary medical leave on February 28, 2004 and returned to work on December, 2004.

48. After being placed on medical leave, Complainant met with Dr. Mughal. At that time, Complainant had hearing aids in both ears and asked when he could return to work. Dr. Mughal said it was not up to him but up to "them."

49. Dr. Mughal never independently examined Complainant.

50. The additional hearing aid cost $3,000.00 and was not covered by insurance.

51. Complainant went to see Dr. Micco after receipt of the second hearing aid.

52. The Cook County Department of Human Resources required Complainant to see an independent physician, Dr. Tsai, who works in their Medical Division.

53. Dr. Tsai performed no tests but consulted with Dr. Micco and prepared a letter dated May, 2004 and provided a form that Complainant could return to work on May 7, 2004.

54. According to the Resource Guide, the form provided by Dr. Tsai was required for Complainant to return to work.

55. Dr. Mughal did not accept Dr. Tsai's recommendation.

56. Although Dr. Micco did not see Complainant, on May 11, 2004, he sent a letter to Dr. Mughal indicating that Complainant had received a second hearing aid and he was, therefore, able to return to work as long as he wore both hearing aids.

57. On May 13, 2004, Dr. Micco wrote that Complainant had received the second hearing aid and was able to return to work.

58. On May 21, 2004, Dr. Mughal directed Complainant to be reevaluated by Drs. Rubach and O'Connor.

59. Complainant met with Dr. Rubach who examined him and had an audiology test performed.

60. Dr. Rubach's findings were similar to that of Dr. Micco.

61. Dr. Rubach suggested that Complainant have his ears drained. That procedure was performed by Dr. Micco, who also inserted a tube in Complainant's ear.

62. Complainant retained counsel and, on August 12, 2004, Complainant's

attorney sent a letter to Dr. Mughal with Dr. Micco's Chart Note indicating that Complainant was cleared to return to work.

63. In August, 2004, Complainant again saw Dr. Micco and fluid was drained from Complainant's right ear. At that time, Dr. Micco did not feel that the insertions of a tube in Complainant's right ear was necessary.

64. On September 27, 2004, Complainant again saw Dr. Micco as a result of fluid recurring in his right ear and the fluid was drained.

65. Complainant was not allowed to return to work and again saw Dr. Rubach who affirmed his recommendation that Complainant could return to work.

66. Dr. Rubach submitted a statement to Dr. Mughal resulting in Dr. Mughal indicating that the hospital was unable to accommodate Complainant's return to work.

67. Complainant does not feel he has "much of a hearing problem" due to his ability to hear conversations without his hearing aids.

68. Complainant's medical leave ended December, 2004. While on medical leave, from February 25, 2004 through December, 2004, Complainant received no salary but did receive disability benefits of $6,500.00.

69. Complainant's gross wages in 2004 were $17,109.00. (See Exhibit 27)

70. Complainant's gross wages in 2005 were $75,883.52. (See Exhibit 21)

71. Complainant applied for, but did not receive, workman's compensation benefits.

72. Complainant was cleared to return to work by Dr. Mughal on November 14, 2004.

73. Since January 2006, Orlando Brown (Brown) has been Director of Labor Relations at Respondent with responsibility, *inter alia,* for any disciplinary actions of Respondent's employees.

74. Prior to January 2006, Brown was Director of Human Resources and

Labor Relations at Respondent.

75. Orlando Brown (Brown) sits on Respondent's Americans with Disability Act (ADA) Committee, which is responsible for reviewing return-to-work status of employees due to their medical conditions.

76. The ADA Committee is impaneled by Respondent's Human Resources Department.

77. In 2004, the ADA Committee consisted of Woodard, McDade and Dennis Rice.

78. Although Brown performs investigations, he did not perform an investigation of the incident, nor did he delegate anyone to investigate said incident.

79. Plant operations made Brown aware of potential disciplinary action against Complainant resulting from the January, 2004 incident.

80. In response to information from plant operations, the ADA Committee recommended Complainant be subjected to a fitness for duty examination.

81. Dr. Micco's February, 2004 letter and accompanying chart note was relied upon by the ADA Committee in its recommendation.

Conclusions of Law

1. Complainant is an "aggrieved party" and Respondent is an "employer" as those terms are defined in the Illinois Human Rights Act, **775 ILCS5/1-103(B)** and **5/1-101(B).**

2. The Commission has jurisdiction over the parties and the subject matter of the action.

3. Complainant has presented a *prima facie* case of handicap discrimination.

4. Respondent has been unable to present a legitimate, non-discriminatory reason for its actions against Complainant in violation of the Act.

Discussion

For this analysis, I am disregarding certain information set forth in the "Findings of Fact" as not germane to the underlying issue before the Commission. They were, however, useful as an understanding of the environment in which Complainant worked.

In his complaint, Complainant alleges handicap discrimination. Complainant contends that Respondent acted in violation of the Act when it placed him on involuntary medical leave of absence.

In a case of unequal treatment due to handicap, a *prima facie case* may vary based upon the facts. However, Complainant meets his burden of a *prima facie* case of handicap discrimination under the Act where Complainant shows: (1) He is handicapped within the definition of the Act; (2) the handicap is unrelated to the person's ability to perform his function of the job to which he was hired; and (3) an adverse job action was taken against the Complainant due to the handicap. *Borchelt and County of Grundy,* IHRC, ALS No. 11300, February 18, 2003. See also *Whipple v. Illinois Department of Rehabilitation Services, et al.,* 269 Ill.App.3d 554, 646 N.E.2d 275, 206 Ill.Dec. 908 (4th Dist. 1995).

In response to Complainant's allegations, Respondent claims that: (1) Complainant is not handicapped under the act and (2) safety issues resulting from Complainant's failure to hear certain warning signals supports their placing Complainant on an involuntary leave of absence as a legitimate, non-discriminatory act.

Prima Facie Case of Handicap Discrimination

Complainant has met the criteria for a *prima facie* case of handicap discrimination. I find first that Complainant is handicapped as defined under the Act.

775 5/1-103(I) of the Act defines disability as:

" *a determinable physical or mental characteristic of a person, including, but not limited to, a determinable physical characteristic which necessitates the person's use of a guide, hearing or support dog, the history of such characteristic, or the perception of*

such characteristic by the person complained against, which may result from disease, injury, congenital condition of birth or functional disorder and which characteristic:

(1) For purposes of Article 2 is unrelated to the person's ability to perform the duties of a particular job . . . "

I further find that Complainant's disability is unrelated to his ability to perform his job as engineer. Respondent's failure to provide, at the public hearing, any substantive evidence that Complainant failed to hear any warning signals **while on duty** on the day of the incident supports Complainant's claim of discrimination. To the contrary, Complainant testified that he did not come on duty until approximately 4-1/2 hours after the incident. Additionally, when Complainant was called into a meeting with Dr. Mughal and summarily placed on involuntary medical leave of absence, he was provided no opportunity to explain his lack of personal knowledge of the incident.

I also find that an adverse action was taken against Complainant as he was placed on an involuntary medical leave of absence without regard to Complainant's individual assessments provided Respondent, resulting in a loss of wages.

Finally, I find that Respondent's reason for placing Complainant on involuntary medical leave of absence without merit. This is most telling with the undisputed testimony that Complainant was not on duty at the time of the incident which allegedly caused the actions leading to his financial hardship. Complainant had a 14 year unblemished record. Complainant followed all of Respondent's "bells and whistles" in attempting to resolve the issue and be released to return to work. Four doctors found Complainant suitable to safely return to work in his position as engineer. However, Dr. Mughal forced Complainant to endure constant medical appointments which involved numerous medical procedures before allowing Complainant to return to work. After released to return to work, Complainant functioned in his capacity as engineer without incident.

Relevant Issues

There are two issues to be determined: (1) whether Respondent had a basis, based upon an individual assessment, to place Complainant on an involuntary medical leave of absence; and (2) whether the individual assessments received by Respondent supported Complainant's continued involuntary medical leave of absence.

The testimony and exhibits admitted into evidence as set forth above, which included comprehensive individual assessments of Complainant's hearing, are note worthy. All the individual assessments provided to Respondent indicated Complainant's ability to safely perform his job as engineer. Respondent's refusal to return Complainant to his current position as engineer is contrary to each and every individual assessment it received.

In making a determination of handicap discrimination, one must make an individual assessment **based on the evidence provided.** (Emphasis added.) *Fernandez and Damon Clinical Laboratories,* IHRC, ALS No. 8731, June 18, 1998. All the evidence provided indicates Complainant's ability to safely perform his position, a position that he currently holds.

I further find that, based upon the testimony and exhibits admitted into evidence as set forth above, Respondent did not have reason to continue Complainant's involuntary leave of absence after numerous individualized assessments that Complainant was cleared to return to work. After the incident, Dr. Mughal directed Complainant to have his hearing evaluated by Complainant's personal physician (Tr. p. 406.) As a result of Dr. Mughal's directive, Complainant saw four doctors to evaluate his hearing, Drs. McDermott, Micco, Tsai, and Rubach. (Tr. pp. 73-90.) Dr. McDermott sent Complainant to Dr. Micco, a hearing specialist. Drs. Micco, Tsai and Rubach all indicated that Complainant could return to return with the accommodation of hearing aids in both ears. (Tr. pp. 97, 105 and 113.) Complainant received a hearing aid in his

right ear on May 6, 2004. (Tr. p 110.) On June 4, 2004, Complainant saw Dr. Rubach, an independent medical examiner, at the request of Dr. Mughal. (Tr. pp. 111-112.)

Rather than accept the recommendations of these independent doctors that Complainant was cleared to return to work. Dr. Mughal continued Complainant's involuntary medical leave. Throughout his involuntary medical leave, Complainant complied with all directives from Dr. Mughal. It was not until November 12, 2004, that Dr. Mughal sent a letter authorizing Complainant to return to work. (Tr. p. 443.) Complainant was removed from involuntary medical leave in December, 2004. (Tr. p. 122.)

Respondent's justification for Complainant being placed in involuntary leave of absence was an incident which occurred on January 14, 2004. Respondent claimed that Complainant was unable to hear the "bells and whistles" which alerted the engineer on duty of a problem. Complainant's uncontroverted testimony was that he was not on duty at the time of the incident. Complainant testified that: (1) this was the first instance of a "hearing" issue after 14 years of service with Respondent; (2) that he had good evaluations during his service; (3) inexplicably, he did not have his annual evaluation in 2003; (4) the January 14, 2004 incident was never discussed with him during a meeting with Dr. Mughal when he was placed on involuntary leave of absence; (5) he complied with every request from Respondent after being placed on an involuntary leave of absence in an effort to return to work; (6) as early as February 2, 2004, in a Chart Note by Dr. Micco, Dr. Micco indicated that "As far as accommodating his hearing loss, he definitely should get a hearing aid in the other ear. He still has enough hearing that it should be safe for him to work"; (7) On May 17, 2004, Respondent was advised that Complainant had received a second hearing aid at his own cost; (8) visits to Drs. Micco, Rubach and Tsai all indicted that Complainant could return to work; and (9) Dr. Mughal resisted all the recommendations.

Damages

Back Pay

Complainant is seeking an award of lost back pay (straight time and overtime) in the amount of $70,000.00 This is based upon Complainant's 2004 and 2005 earnings. Complainant is further seeking one and one-half times that rate for overtime work. According to the testimony, Respondent's operating engineers average 12 hours overtime every two weeks. Finally, Complainant seeks pre and post judgment interest plus attorneys' fees and costs.

I find that the evidence supports a back pay award of $58,774.52. This is a simple arithmetical function of deducting his gross 2004 wages from his gross 2005 wages. I find any further award relating to overtime as speculative in nature with insufficient information to enable the Commission to determine such an award.

Disability Payments

Complainant acknowledges receiving $6,500.00 in disability payments. The issue then becomes should those payments be deducted from the award of back pay. For that determination, we need look to the *collateral source rule.*

Briefly, the *collateral source rule* legal principle holds that "in a civil matter, the prevailing plaintiff's recovery shall not be reduced by any payment made by a source not under the control of the defendant. *Orozco and Dycast,* IHRC, ALS No. 7178R, July 7, 2008. The Appellate Court in *City of Chicago v Illinois Human Rights Comm'n and Richard Foss,* 264 Ill. App.3d 982, 637 N.E.2d 589 (1st Dist. 1994) held that whether pension or disability benefits fall within the *collateral source rule* is to be determined on a case by case basis and that the Commission has discretion to decide whether to deduct these benefits from the back pay award. *Wiley and City of Chicago, Department of Police,* IHRC, ALS No. 5583, May 5, 1997.

I find for the following reasons disability payments received by Complainant should be deducted from the award of back pay.

Firstly, whether disability payments fall within the *collateral source rule* is determined on a case-by-case basis. In this determination, the Commission has discretion to deduct those payments from the back pay award.

Secondly, a determination has to be made whether Complainant's retention of disability payments and back pay would be a windfall to Complainant or whether Respondent receives a windfall and "is essentially rewarded for engaging in discriminatory activities." *Foss, supra.*

There was no nexus between the receipt of the disability payments and Respondent's actions. I, therefore, find it appropriate to deduct said payments from the back pay award.

Emotional Distress

It has long been established that the Commission's statutory authority to award a prevailing complainant his or her actual damages includes the ability to award monetary damages for emotional distress. *Village of Bellwood and Illinois Human Rights Commission,* 184 Ill.App.3d 339, 355, 541 N.E.2d 1248, 133 Ill. Dec. 810 (1st Dist. 1989).

In *Howell and Bradford Securities Processing Services, S.P.S.,* 1HRC, ALS No. 8927, August 18, 1998, the Commission made a presumption that full back pay will make a complainant whole. *Howell* also noted that a violation of a person's civil rights, in and of itself, is not sufficient to justify an award of emotional damage. Other Commission cases have endorsed the concept that awarding emotional distress damages is appropriate where the Act has been violated and where it is clear that recovery of pecuniary losses will not make the complainant whole. *Smith and Cook County Sheriff's Office,* 1 HRC ALS No. 1077(RRP), October 31, 2005.

At the public hearing, Complainant testified that after his meeting with Dr. Mughal he felt "angry, trapped, betrayed." (Tr. p. 101) Complainant further testified that he felt he was the victim of a "cabal." (Tr. p. 108.)

Complainant's testimony of being angry, trapped, betrayed and a victim of a cabal supports a finding of an award of emotional distress damages.

RECOMMENDATION

Based upon the foregoing, it is recommended that an order be entered awarding Complainant the following relief:

A. That Respondent pay to Complainant the sum of $58,774.52 as compensation for lost back pay;

B. The Respondent pay to Complainant prejudgment interest on the back pay award, such interest to be calculated as set forth in 56 Ill. Admin. Code., Section 5300.1145;

C. That the disability benefits of $6,500.00 be deducted from the award of back pay.

D. That Respondent pay to Complainant the sum of $10,000.00 as compensation for the emotional damages suffered by his as a result of Respondent's actions in this matter;

E. That Respondent clear from Complainant's personnel records all references to the filing of the underlying charge of discrimination and the subsequent disposition thereof;

F. That Respondent pay to Complainant the reasonable attorney's fees and costs incurred in prosecuting this matter, that amount to be determined after review of a motion and detailed affidavit meeting the standards set forth in **Clark and Champaign National Bank,** IHRC, 354(J), July 2, 1982, said motion and affidavit to be filed within 21

days after the service of this Recommended Liability Determination; failure to submit such a motion will be seen as a waiver of attorney's fees;

G. If Respondent contests the amount of requested attorney's fees, it must file a written response to Complainant's motion within 21 days of the service of said motion; failure to do so will be taken as evidence that Respondent does not contest the amount of such fees;

H. The recommended relief in paragraphs A through E is stayed pending issuance of a Recommended Order and Decision with the issue of attorney's fees resolved.

HUMAN RIGHTS COMMISSION

BY:_____
GERTRUDE L. MCCARTHY
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED March 22, 2010

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

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STANLEY H. HOOD,	)	
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Complainant,	)	**Charge No.: 2004CA3552**
	)	**EEOC No.: 21BA42226**
PROVIDENT HOSPITAL OF COOK COUNTY,	)	**ALS No.: 05-414**
	)	
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter is ready for consideration on Complainant Stanley H. Hood's *Petition for Award of Attorneys' Fees and Costs.* A *Recommended Liability Determination* (RLD) was issued on March 22, 2010. Respondent has filed a timely response to Complainant's petition.

Findings of Fact

1. Complainant, Stanley H. Hood, is entitled to attorneys' fees and costs in accordance with the *Recommended Liability Determination* entered in this case.

2. All previous findings of fact found in the *Recommended Liability Determination* are incorporated by reference herein.

3. Complainant's attorneys, Chicago-Kent Law Offices, are headquartered in Chicago, Illinois.

4. Complainant's attorneys have provided extensive documentation representative of the voluminous work performed on his behalf including, but not limited to, affidavits of attorneys who have worked on this matter.

5. A reasonable hourly rate for Laurie E. Leader is $375.00.

6. A reasonable rate for Edward Kraus is $275.00.

7. Attorney Leader has spent 148.51 hours on this matter for a total billing of

$55,691.25.

8. Attorney Kraus has spent 142.55 hours on this matter for a total billing of $39,201.25.

Conclusions of Law

1. A prevailing complainant may recover reasonable attorneys' fees for the reasonable number of hours expended to maintain his action.

2. The current reasonable rate to which an attorney is entitled to is the proper rate to be applied to the full fee request, absent an increase in the attorney's standard fee for a reason other than the natural operation of economic forces over time.

3. Attorney Leader's hourly rate of $375.00 is reasonable.

4. Attorney Kraus's hourly rate of $275.00 is reasonable.

5. Certain of the hours billed are either unreasonable, duplicative and/or excessive. As such, a reduction in those hours is proper.

6. Complainant has demonstrated that he is entitled to attorneys' fees and costs in the amount of $84,045.75.

Discussion

Once there has been a finding that a respondent has violated the Act and a complainant's damages have been determined, the only issue remaining is the amount of attorneys' fees and costs that should be awarded to complainant under the Act. See *775 ILCS 5/8A-104(G).*

The fee petition seeks $94,892.50 in attorneys' fees and $4,328.25 in costs.

The purpose of the attorneys' fee provision of the Act is to ensure that attorneys who practice before the Commission are adequately compensated for their services. See *Lieber and Southern Illinois University Board of Trustees,* IHRC, ALS No. 884(RJG), September 25, 1987. Further, in accordance with *Lieber,* I have taken into consideration that all doubts are to be resolved in favor of Respondent.

In the case of *Clark and Champaign National Bank,* IHRC, ALS No. 354(J), July 2, 1982, the Commission set factors as guidelines when considering an award of attorneys' fees and costs. Under *Clark,* the burden of proof for the petition for an award of attorneys' fees is the same that is applied for a money judgment. *Id.*

The first factor is the factual showing necessary to establish each attorney's hourly rate. The hourly rate should be based on the experience of the attorney and the type of work involved. *Id.* Citing *Copeland and Marshall,* 641 F.2d 880, 892 (D.C. Cir. 1980). The hourly rate may be established in a number of ways including, but not limited to, affidavits outlining the fees of attorneys with comparable experience and qualifications or affidavits showing the actual billing practice of the attorney requesting fees for the relevant time period. See *Tolbert and Fraternal Order of Eagles Olney Aerie,* IHRC, ALS No. S-12131, July 7, 2005. The actual rate that the complainant's attorney is able to charge in the market place is indicative of prevailing community standards. *Id.*

Chicago-Kent Law Offices, representing Complainant, has provided detailed affidavits which establish the years of service of the attorneys who worked on this matter. In addition to the affidavits of Attorneys Leader and Kraus, they include the affidavits of Richard Gonzalez and Steven J. Plotkin. The affidavits of Leader and Kraus provide an extensive day to day detailed analysis of work performed and by whom. Complainant has also included a copy of the Fee Agreement executed by the parties on December 12, 2005.

Hourly Rates of Laurie Leader

Laurie Leader (Leader) states that her hourly rate when the fee agreement was entered into on December 12, 2005, was $375.00 and is an appropriate billing rate for this matter. Leader claims that $325.00 per hour is her non-litigation fee and $375.00

per hour is her litigation fee. She also claims that for class action work she charges $450.00 per hour.

Respondent argues that the hourly rate is excessive for fee awards before the Commission and that some of the legal services provided are duplicative or excessive..

Hourly Rate of Edward Kraus

Edward Kraus (Kraus) states that his hourly rate, when the fee agreement was entered into on December 12, 2005, was $275.00 and is the appropriate billing rate for this matter. He further states that his current hourly rate is $300.00.

Respondent argues that the hourly rate is excessive for fee awards before the Commission and that some of the legal services provided are duplicative or excessive.

Appropriate of Hours Worked

The affidavits of Attorneys Richard J. Gonzalez and Steven J. Plotkin attest that the hourly rates of Leader and Kraus are reasonable for their experience within the legal community.

Respondent claims that the hourly rate is excessive and that there are duplicative legal services.

Respondent further argues that that Complainant cites only federal decisions in his fee petition. Respondent alleges that in examining fee awards before the Commission an appropriate hourly rate for Leader would be $250.00 and that an appropriate hourly rate for Kraus would be $200.00.

I find Respondent's argument without merit. In reviewing the affidavits of Leader and Kraus, together with the supporting affidavits of Gonzalez and Plotkin, I find their hourly rates not to be excessive. Complainant brings to the Commission, in support of the hourly rates of the attorneys, affidavits replete with evidence of their experience and that their requested hourly rate is commensurate with their standard fee. Additionally, attached to the fee petition is the fee agreement executed by Complainant. This is clear

and convincing evidence of the appropriateness of the hourly fees requested by the Complainant's attorneys. In contrast, Respondent brings nothing to the table to support its argument except three Commission cases. It is of interest that in two of the three cases cited by Respondent, the hourly fees awarded the attorneys are what had been agreed to between the parties. Finally, the Commission has previously held that an attorney's affidavit can be adequate evidence to support an award of fees. *Lemery and Balmoral Racing Club,* IHRC, ALS No. 11835, February 1, 2006. *See also* Leseiko *and Chase/Ehrenberg & Rosene, Inc.,* IHRC, ALS No. 11592, March 23, 2004. I, therefore, find that the affidavits of Leader and Kraus are adequate evidence in support of their hourly rates.

Number of Hours Reasonably Expended

Once the hourly rate is decided, the next step is to determine whether the hours claimed to be spent on the matter are reasonable.

56 Ill. Admin Code, Section 5300.765, entitled **Petitions for Fees and/or Costs** states that '(s)upporting documentation shall include the following:

(a)(1) *The number of hours for which compensation is sought, itemized according to the work that was performed, the date upon which the work was performed and the individual who performed the work."*

Respondent cites certain dates wherein the hours spent were excessive or duplicative as set forth below:

8/3/04 - Both attorneys Leader and Kraus participated in a telephone conference with Complainant, Kraus explaining the call was regarding a doctor's appointment. I note that the primary consideration in this matter was the prognosis for Complainant to return to work after an involuntary medical leave. Accordingly, Complainant saw a variety of doctors. I find it appropriate and necessary that co-counsel would spend a reasonable amount of time collaborating and engaging concurrently in activities related

to preparation for the public hearing in this matter, particularly on such a important aspect of the matter.

10/25/04 - Both attorneys Leader and Kraus participated in a strategy conference amounting to .42 hours per attorney. Respondent argues that the Department had completed its investigation and a verified response had been filed. As a result Respondent contends that no strategy session was necessary. Respondent has provided no case law relating to the time when a strategy session is appropriate. Although I did not find Respondent's argument compelling, I did consider the time spent in the strategy session of .42 hours per attorney. I do not find that time excessive in light of the need for attorneys to discuss cases which they are working on together.

3/9/05 - Attorneys Leader and Kraus each billed 1.25 hours for participating in a meeting with client regarding the fact finding conference with the Illinois Department of Human Rights (Department). Respondent argues that the fact-finding conference is conducted by an IDHR investigator. However, Respondent fails to acknowledge that it is not inappropriate for a person filing a Charge before the Department to be assisted by an attorney in preparation for and attending a fact-finding conference. I do, however, find that it was not necessary for both attorneys to be involved in that preparation. It is, therefore, appropriate to reduce attorney Leader's time by one hour, thereby reducing the fee award for this time by $375.00.

3/23/05 - Attorneys Leader and Kraus had a discussion regarding strategy billing .50 hours per attorney. Respondent argues that there is no strategy to be formulated at this stage. Respondent further argues that attorney Kraus, with his experience, should not have had to consult with attorney Leader. Although Respondent's argument may have merit, there is nothing to substantiate that the time spent was excessive or unnecessary. It is impossible to objectively evaluate how much time is necessary for attorneys to confer while working on a case. I, however, find that

the time allotted for strategy discussion was not excessive and find no reduction in fees for this date.

1/20/06 - Attorneys Leader and Kraus worked on discovery documents (interrogatories and notice to produce). Attorney Leader billed 1.33 hours and attorney Kraus billed 2.33 hours. Respondent argues that attorney Leader's time is overlapping and unnecessary. I don't find it unreasonable for work to be reviewed by another attorney. I do, however find the amount of time excessive. It is, therefore, appropriate to reduce attorney Leader's time by one hour, thereby reducing the fee award by $375.00 .

3/7/06 - Attorney Leader billed 1.42 hours on this date for additional discovery revisions, telephone conference with attorney Kraus and opposing counsel. Respondent argues that that billing fee should be disregarded as excessive, particularly in light of Attorney Kraus's entry of time for March 6, 2006 in the amount of 3.25 hours for a meeting to "finalize discovery responses; reviewed and finalized responses." I find the billing in this instance excessive. It is, therefore, appropriate to reduce attorney Leader's time by one hour, thereby reducing the fee award for this time by $375.00

3/5/07 - Attorney Leader billed 2.75 hours to meet with attorney Kraus, review critical documents and work on strategy for the deposition of Dr. Mughal. Attorney Kraus billed 2.50 hours in preparation for the deposition of Dr. Mughal. Respondent argues that attorney Kraus's time on this date should be disregarded as unnecessary and excessive. I find some merit in Respondent's argument but find that the proper approach is to reduce attorney Leader's time by one hour, thereby reducing the fee award for this time by $375.00.

3/13/07 - Attorneys Leader and Kraus each billed 1.42 hours for a telephone conference with opposing counsel and client for matters involving settlement. Respondent argues that there was no need for both attorneys to participate in the telephone conferences. I find Respondent's argument has merit. I am, therefore,

reducing attorney Leader's time by one hour, thereby reducing the fee award for this time by $375.00

5/3/07 - On that date and the dates of 5/6/07 and 5/23/07, attorneys Leader and Kraus billed 6.75 hours in preparation of a joint prehearing memorandum. Respondent's claim that attorneys Leader and Kraus spent 7.5 hours in preparation of a joint prehearing memorandum is unsupported by the record. Respondent, however, further claims that, as one-half of the information was provided by them, the hours expended were excessive. I find merit in Respondent's argument. I also find the time expenditures are not of sufficient detail and do not indicate specific tasks performed in preparation of the joint pre-hearing memorandum, such as reviewing witness statements, reports, exhibits etc. I, therefore, find that it is appropriate to reduce attorney Leader's time by two hours, thereby reducing the fee award for this time by $750.00.

8/1/07 - Complainant contends that attorney Kraus overbilled on the public hearing date of 8/1/07. Complainant alleges that attorney Kraus, having billed 2.25 hours more than attorney Leader on that date, is excessive. It should be noted that although the public hearing itself on that date did not last 9.50 hours, time is often spent prior to and after the public hearing for discussions with the client. I do not find that the additional 2.25 hours spent by attorney Klaus is excessive. Accordingly, attorney Kraus's time for that date will not be reduced.

Respondent further contends that the number of hours spent by Complainant's attorneys on trial preparation is duplicative and excessive. Respondent additionally contends that the description for certain dates is not sufficiently detailed and, therefore, in not in compliance with *56 Ill. Admin. Code, Section 5300.765(a)(1).* Respondent points out that in Complainant's fee petition, he lists a total of 114.83 hours for conferences with witnesses and preparing witnesses for trial. Respondent alleges that

such lack of detail does not permit appropriate scrutiny by the non-moving party. Respondent notes that Complainant called only three witnesses at trial. Although the Joint Pre-Hearing Memorandum, filed with the Commission, lists only four witnesses to be called at trial, seven names are listed as potential witnesses. After having reviewed the specific itemizations in Complainant's fee petition, I find that, although Respondent's argument has merit, some of its statements are misleading. The fee petition supports Respondent's claim that attorney Leader spent 45.17 hours during the period from June 14, 2007 to July 31, 2007, much of that time was spent in trial preparation and, not as is suggested by Respondent, in conferences with witnesses. The fee petition also supports Respondent's claim that attorney Kraus spent 69.66 hours during the period from July 11, 2007 to July 31, 2007. Again, much of that time was spent in trial preparation and not, as is suggested by Respondent, in conferences with witnesses. Having reviewed all the entries for the subject time period, I find that the time expenditures are not of sufficient detail and do not indicate specific tasks performed. I, therefore, find it appropriate to reduce attorney Leader's time by 14 hours and attorney Kraus's time by 13 hours for a total reduction for that time period of $8,825.00.

Complainant finally argues that the time spent on post-hearing briefs is duplicative and excessive. Attorneys Leader and Kraus billed a combined total of 33.08 hours. In reviewing the fee petition, both attorneys researched post-trial issues and there were extensive revisions and editing. I find that some of the time spent on the post-trial brief excessive and, therefore, I find it appropriate to reduce each attorney's time. I am, therefore, reducing attorney Leader's time by seven hours and attorney Kraus's time by four hours for a total reduction for time spent on the post trial brief of $3,725.00.

Expert Witness Fees

Complainant also seeks $3,450.00 in fees from Dr. Micco which represents Dr. Micco's meeting time with Attorney Kraus and one-half day of testimony. The document provided by Complainant indicates that Complainant reimbursed Dr. Micco in the amount requested. I, therefore, find this expense appropriate and no reduction is necessary.

Additional Costs

Complainant finally seeks $878.25 for the court reporter costs for the deposition of Dr. Muighal which was pursuant to my order of February 14, 2007. The document provided by Complainant indicates that Complainant reimbursed the court reporting service in that amount. I, therefore, find this amount appropriate and no reduction is necessary.

RECOMMENDATION

Accordingly, I recommend the following:

1. That Respondent pay to Complainant the sum of $79,717.50 for reasonable attorneys fees in this case.

2. That Respondent pay to Complainant the sum of $4,328.25 as costs reasonably expended in this case.

3. That Complainant shall receive all other relief recommended in the RLD entered in this case on March 22, 2010.

HUMAN RIGHTS COMMISSION

BY:_____
GERTRUDE L. MCCARTHY
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED August 25, 2010